SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71 - 538

CITY OF DETROIT,
a Michigan Municipal Corporation,
Petitioner-Plaintiff,

vs.

GARMENT CORPORATION OF AMERICA,
a Michigan Corporation,
Respondent-Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN DIVISION I AND APPENDIX

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WO. 1-4710—WO. 1-4711

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	3
Constitutional Provisions Involved, etc.	4
Statement of Case	4
Reasons for Granting the Writ	7
Conclusion	10
Appendix A—Opinion of Michigan Court of Appeals	1a
Appendix B—Order of Michigan State Tax Commission	5a
Appendix C—Statutes	8a

AUTHORITIES CITED

	Page
American Mannex Corp. v. Cronvich (1968) 207 So. 2d 778	9
Askren v. Continental Oil Co. (1920) 252 US 444	9
Austin v. State of Tennessee (1900) 179 US 343	9
Brown vs. Maryland (1827) 12 Wheat (US) 419	8
City of Galveston v. Mexican Petroleum Corp. (1926) 15 F 2d 208	9
E. J. Stanton and Sons v. Los Angeles County (1947) 177 Pac. 2d 804	9
F. May and Co. v. New Orleans (1900) 178 US 496	9
Hooven and Allison Co. v. Evatt (1945) 324 US 652, 663	7
Mexican Petroleum Corp. vs. South Portland (1922) 115 Atl 900	9
Youngstown Sheet and Tube Co. v. Bower (1959), 358 US 534	8

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GARMENT CORPORATION OF AMERICA,
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Respondent-Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN DIVISION I

To: *The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner-defendant City of Detroit, a Michigan Municipal Corporation, prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals, Division I, entered in the above-entitled consolidated action on April 23, 1971, from which an application for leave to appeal was sought and denied by the Supreme Court of Michigan on July 20, 1971.

A. OPINIONS BELOW

The opinion of the Michigan Court of Appeals, an appellate court of said State, appears in 189 N.W. 2d 72 (1971) (Appendix A). It reversed and struck down an increase in the 1969 assessment against respondent-plaintiff ordered by the State Tax Commission on June 25, 1970 with respect to certain personal property claimed immune as imports from local ad valorem taxes. The opinion of said State Tax Commission is not reported. It is printed hereafter as Appendix B.

Denial of application timely filed for leave to appeal to Supreme Court of Michigan issued on July 20, 1971 appears in — N.W. 2d — (1971).

B. JURISDICTION

(1) Involved herein is a determination by the Court of Appeals reversing and striking down an order of the State Tax Commission issued June 25, 1970. The State Tax Commission is the highest administrative reviewing body authorized to pass on property assessment appeals in Michigan.

Respondent's contention was that it was the importer of certain quantities of foreign garments still in cases or cartons on tax day, held for resale in storage areas at its place of business which it claimed immune from taxation by virtue of Article I, Section 10, cl 2 of Constitution of the United States. Upon refusal of the State Tax Commission to accept the contention that said cases or cartons were the original package in the constitutional sense, respondent obtained leave to appeal to Michigan Court of Appeals

which after briefs and oral argument reversed the determination of said Tax Commission.

Timely application for leave to appeal filed with the Supreme Court of Michigan by petitioner was denied July 20, 1971.

(2) Jurisdiction of this Court to issue its writ of certiorari is invoked under C. 646, 62 Stat. 929 (28 USCA 1257(3)).

C. QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

Are individual cardboard cartons at rest in respondent's place of storage—each generally containing five dozen work pants or ten dozen work shirts, compressed and sealed with tape by the manufacturer, then deposited into a van-type container at the Puerto Rican manufactory, then shipped from Puerto Rico to Detroit, transported to the importer's warehouse, taken from the van after the seal on the van has been broken and then placed in the importer's warehouse for temporary storage, awaiting sale to local customers—"original packages" within the meaning and intent of Art. I, § 10 of the United States Constitution and thus, immune from ad valorem taxation by state and local government?

Whether, in the constitutional sense, a van-type container and all its contents as a unit constituted the original package with the result that upon being unloaded at respondent's place of business, that portion of the contents consisting of separately bound cartons remaining on hand on tax day had lost their immunity as imports?

D. CONSTITUTIONAL PROVISIONS INVOLVED, ETC.

The provision in Article I, Sec. 10, cl 2 of the United States Constitution reads as follows:

> "No State shall, without the Consent of the Congress lay any imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress."

Statutory provisions applicable to assessments which provide a basis for Michigan personal property taxes herein are referred to below. Being too lengthy to set forth in full, the pertinent text appears in Appendix C attached hereto.

E. STATEMENT OF THE CASE

An assessment for 1969 was placed against respondent with respect to its personal property in Detroit. Such assessment served as the base for determination and levy of personal property taxes to be collected from respondent on behalf of petitioner city, the Board of Education of City of Detroit as well as the County of Wayne.

Respondent appealed to Michigan State Tax Commission, the highest administrative review agency authorized to hear and decide assessment appeals in the State. Evidence was presented on December 17, 1969. Respondent's offer of proofs being deemed inadequate, an adjournment was agreed on over to April 7, 1970. Hearing was resumed and

closed on that date. Respondent showed that the garments claimed immune, principally work shirts and pants were manufactured in and imported from Puerto Rico. The manufacturer had the garments compressed and packed into large heavy duty cardboard cases or cartons. Each case was then sealed with heavy sealing tape and reinforced with straps or steel bands.

The cartons were loaded by employees of the manufacturer at its place of business on to van-type containers of special construction designed specifically for overseas shipment for a door to door pick up and delivery by common carriers.

Use of container vans when fully loaded permitted a seal to be affixed to the door at the place of loading. It was then hauled on flat bed trucks or on retractable or removable wheels to be loaded on board ship by dockside cranes. At port of entry the process was reversed for delivery to respondent's receiving dock. Then the seal was removed and the latter's employees unloaded and stored the cartons in the warehouse area of its place of business.

Advantages of time and labor saving as well as reduction of theft or damage were evidenced by brochures presented in evidence by respondent at the hearing below.

Despite the contention that the cases or cartons were the original package and the sealed container vans were merely a method of transportation and delivery, the determination of the State Tax Commission denied the immunity from local taxation claimed by respondent based on the Import-Export clause.

The State Tax Commission upheld the assessment of petitioner's Board of Assessors which included the remaining imported inventory still in cases or cartons in respondent's warehouse on tax day.

Personal property assessments under Michigan Law are ad valorem in nature and are placed against the owner or person in possession. Taxes levied against respondent based on the increased assessment by the Tax Commission were non-discriminatory, i.e. the procedures to include and value respondent's inventory of foreign origin and rates of taxation were the same as in the case of any tangible personal property of domestic origin in Michigan in 1969 (App. C).

Respondent sought and obtained leave to appeal to the Court of Appeals. Briefs were filed and argument presented. The decision of the Court of Appeals concluded that the use of the vans did not go to the essential nature of the transaction, but to the formalities of transportation. The determination of the State Tax Commission was reversed. (App. A) 189 N.W. 2d 72 (1971).

(a) FEDERAL QUESTIONS RAISED BELOW

The constitutional immunity question based on Article I, Sec. 10, cl. 2 of the Constitution of the United States was timely and properly raised at the following stages:

Before the State Tax Commission (App. B). (See paragraph two and finding numbered 2 of order of the Commission.)

Before Michigan Court of Appeals (App. A) 189 N.W. 2d 72.

Said constitutional immunity was withheld by the State Tax Commission. The determination of the latter was struck down by the Court of Appeals which upheld the claim of immunity. The Supreme Court of Michigan denied leave to appeal.

F. REASONS FOR GRANTING THE WRIT

(a) PENDING LITIGATION IN THIS AND OTHER STATES

The constitutional issues involved in respondent's 1969 assessment presented for review are typically being raised more often in Michigan as well as in States bordering on the oceans. Others have challenged assessments with respect to goods brought into this state from foreign sources by means of container vans. The amounts of city, county and school taxes in contention are pyramiding in amount due to the ever increasing volume of foreign goods arriving by this medium from overseas and claimed immune under the import-export clause of the United States Constitution.

Early consideration by this Court of the power of a local unit of the State to include imports upon removal from such container in common with domestic goods subject to taxation under the facts herein is urgently required. It would provide much needed guidelines and eliminate much of the contention in this respect now and still to come.

(b) FAILURE TO APPLY CONSTITIONAL PRINCIPLES

The opinion of the Court below mistakenly relied on an excerpt from *Hooven and Allison Co. v. Evatt* (1945) 324 US 652, 663 which reads as follows:

> "When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected."

The Hooven and Allison facts did not involve the issue of domestication by breaking of an original package. Moreover when this Court had occasion to hear and decide the later case of *Youngstown Sheet and Tube Co. v. Bower* (1959), 358 US 534, it noted at p. 545:

> "The design of the constitutional immunity was to prevent 'the great importing States from laying a tax on the non-importing States' to which the imported property is or might ultimately be destined, which would not only discriminate against them but also 'would produce countervailing measures on the part of those States whose situation was less favorable to importation.' *Brown v. Maryland, supra* (US) (12 Wheat at 440)."

(c) ORIGINAL PACKAGE DOCTRINE APPLICABLE TO CONTAINER VANS

It was the plain intent of this Court in *Brown v. Maryland, supra,* to uphold the claim of Constitutional immunity until the imported goods had completed their journey and become domesticated. One of the examples of how such goods may be acted upon by the importer so as to be considered domesticated is upon breaking of the original package.

The container van is such an original package in the constitutional sense for the reason that it had been selected and served as means of combining and transporting the imported goods from the shipper's door, brought into this country intact in this form and delivered to the door of this respondent's place of business at Detroit where the seal is broken and the cartons removed from the container van by respondent's employees.

In the lexicographical sense the contents may be deemed imports. However, in the constitutional sense, the container van is the original package under authority of *F.*

May and Co. v. New Orleans (1900) 178 US 496. For upon the opening and unloading of the means selected to bring the contents into this country through the seaboard states to the point of destination, the contents then and there become a part the general mass of domestic property.

(d) OWNERSHIP BY CARRIER OF CONTAINER VAN NOT MATERIAL

It has been held that the term original package applies to receipt of the identical package in the exact condition it was turned over to the carrier by the consignor at the initial point of shipment.

Mexican Petroleum Corp. v. South Portland (1922), 121 Me 128, 115 Atl 900, 26 ALR 965.

Under somewhat different facts, the same litigant obtained immunity in *City of Galveston v. Mexican Petroleum Corp.* (1926) 15 F. 2d 208.

These apparently conflicting views should be resolved by this Court in the present matter in line with the following.

In *Askren v. Continental Oil Co.* (1920) 252 US 444, 64 L Ed 654, 40 S Ct 355, a railroad tank car was treated as an original package.

In *Austin v. State of Tennessee* 179 US 343, 45 L Ed 224, 21 S Ct 132 (48 S.W. 305, 308) a package, bundle or aggregation of goods in the receptacle provided by carrier was held an original package.

See also *E. J. Stanton and Sons v. Los Angeles County,* (1947) 177 Pac 2d 804 and *American Mannex Corp. v. Cronvich* (1968) 207 So. 2d 778 in which Stanton was cited with approval.

CONCLUSION

It should be apparent that the decision of the Court of Appeals permits respondent to have the benefit of immunity from local taxation at the same time that it receives the benefits of door to door delivery of imported goods in a single package. The lower court overlooked that when the container van with the goods inside entered the country, it was a complete package. Thus it failed to consider the facts from the constitutional approach. The goods remained immune of course under the decisions of this Court while the complete package was being transported to respondent's place of business. Upon breaking of the seal and unloading of the cases of goods, the distinctive character of the same as imports had ended because they had reached the end of their importation journey.

In the constitutional sense, respondent's goods became a part of the general mass of property in the country subject to being treated the same as domestic goods.

WHEREFORE, petitioner requests that this petition for a writ of certiorari should be granted.

Respectfully submitted,

City of Detroit, a municipal corporation,
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October 14, 1971

APPENDIX A

STATE OF MICHIGAN

(Court of Appeals)
Division 1

Michigan State Tax Commission and City of Detroit, Plaintiffs-Appellees, v. Garment Corporation of America, a Michigan Corporation, Defendant-Appellant.	No. 9850

Before: Danhof, P.J., Gillis and McGregor, JJ.

McGregor, J. This appeal is from the decision of the state tax commission, affirming the determination of assessment on certain of defendant's personal property. Defendant is an importer of industrial garments, which it sells and distributes throughout the United States. Its principal warehouse is in Detroit, with branch locations in Alabama and Oregon. The garments, principally work shirts and pants, are manufactured in and imported from Puerto Rico, where the garments are compressed and packed into large, heavy-duty cardboard cases or cartons, each containing quantities ranging from 5 dozen pants to 10 or 12 dozen shirts. Each case is then sealed with heavy sealing tape and reinforced with heavy straps or steel bands. These cartons are packed and are then transported to defendant by an independent common carrier.

The carriers use two types of vans or trailers of special construction, designed specifically for overseas shipment.

On each of the vans, the wheels are either removable or retractable, permitting loading and unloading by dockside cranes, as well as the stacking of the vans inside the ships. Upon arrival at the port of entry, the vans are removed from the vessel, wheels are attached to those without wheels, the vans are attached to motor cabs or tractors, and are driven to the addressee terminal. The vans themselves are basically metal bodies, each 8 feet high, 8 feet wide, and 35 feet long. Approximately 500 cartons of shirts and pants can be placed in one of these vans.

Prior to 1968, cartons shipped in this manner were recognized by the plaintiff city of Detroit as being immune from taxation, under the US Constitution, Art I, § 10(2), which provides:

> "No State shall, without the Consent of the Congress, lay any imposts or Duties on Imports or Exports . . ."

In 1968, the city of Detroit first began to assess and tax the property contained in these cartons: the city contended that the van or trailer described above which was utilized by the common carriers should be considered "original packages,"[1] and that, upon arrival of the vehicle at defendant's warehouse, the opening and unloading of the van or trailer should be considered a breaking of the original package. The result would be that the property had lost its essential character as an import and would no longer have its constitutional immunity from taxation.

This concept was sustained by the state tax commission and defendant appeals to this Court.

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[1] "Original package" refers to the doctrine first enuciated in *Brown v. Maryland* (1827), 25 US (12 Wheat) 419, 6 L ed 678, which is later discussed herein.

In the instant case, this Court is confronted with a question of whether the property remained in its original package and was thus immune from taxation or whether appellant, in removing the property from the vans or trailers in which it was shipped and delivered, has, within the meaning of the applicable law, so broken up the packages as to lose the constitutional immunity.

The reference to "original package" first appeared in *Brown v. Maryland, supra,* and was used as an illustration or method for ascertaining whether an import had been so acted upon, altered, or commingled with a common mass of property within the state as to lose its distinctive character as an import. Our Court reviewed some of the leading cases interpreting US Const. Art. I, § 10(2), in *City of Detroit v. Kenwal* (1968), 14 Mich App 657, 659, leave to appeal denied March 20, 1969, 381 Mich 811. Certiorari denied, 396 US 833, — S Ct —, — L ed 2d —; and summarized the applicable law:

> "In *Brown v. Maryland* (1827), 25 US (12 Wheat) 419, (6 L ed 678), the Supreme Court invalidated a state licensing tax and held that a state could not tax imports as long as the property remained in its original form or package. *Low v. Austin* (1872), 80 US (13 Wall) 29, 20 L ed 517 expanded the principles of *Brown v. Maryland* to prohibit states from levying ad valorem taxes on goods which have not lost their character as imports. See also *City of Detroit v. Lake Superior Paper Company* (1918), 202 Mich. 22. Subsequent to *Brown v. Maryland, supra,* it has become well established that imports lose their constitutional immunity when the importer (1) sells them or (2) 'breaks up the packages,' or (3) puts them to the use for which they were imported. *Youngstown Sheet and Tube Company v. Bowers* (1959), 358 US 534 (79 S Ct 383, 3 L ed 2d 490)."

In *Kenwal, supra*, it appears that the imported steel was in its original package and that it was not being put to any use for which it was imported, that Kenwal was the importer and entitled to the constitutional tax immunity.

The test in *Youngstown, supra*, was whether the imported goods had been so put to the use for which they were imported as to lose their character as imports, since such merchandise had entered into the plaintiff's manufacturing process. See *City of Detroit v. Klockner, Inc.* (1970), 383 Mich 76, 79, 80; see also *Knight Newspapers, Inc. v. City of Detroit* (1969), 16 Mich 438, 441.

In the instant case, the merchandise did not lose its distinctive character as an import.

We find no merit in plaintiff's contention that the defendant, in removing the imported goods from the vans in which they were shipped and delivered, has so "broken up" the original packages as to destroy their constitutional immunity. The vans were the property of the carriers who had the right to remove and store the shippers' cartons.

There is no essential difference between these vans and vehicles which are normally used in over-the-road transportation of property; the only slight difference being that they are modified to permit transportation of the entire van by ship. It can only be concluded that the vans and trailers are, in fact, vehicles, or at least instruments of transportation, and the mere use of a new technology in shipping does not destroy the tax immunity of the property shipped.

In *Hooven and Allison Company v. Evatt* (1945), 324 US 652, 663 (65 S Ct 870, 89 L ed 1252, 1262), the United States Supreme Court held:

> "When the merchandise is brought from another country to this, the extent of its immunity from state

> taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected."

The use of the vans here did not go to the essential nature of the transaction, but to the formalities of transportation. To hold otherwise is to extend the scope of the laws by implication or forced construction, contrary to the established law in this jurisdiction. *Topps of Warren, Inc. v. City of Warren* (1970), 27 Mich App 59.

The decision of the state tax commission is reversed. Costs to defendant.

APPENDIX B

STATE OF MICHIGAN

Before the Michigan State Tax Commission

At a meeting of the Michigan State Tax Commission held on the 11th day of May, 1970 at Lansing, Michigan.

In Re Appeal No. 0846 of Garment Corporation
of America, of the city of Detroit,
County of Wayne,
State of Michigan,

The above taxpayer appealed the assessment for the year 1969 (as confirmed by the Board of Review of the city of Detroit) of personal property located in the city of Detroit, County of Wayne, State of Michigan, in the amount of $444,680.

The taxpayer contended that the valuation of the property on appeal was excessive because the assessors have included in the assessment certain items of inventories which, are immune from Ad Valorem Taxation.

The Commission caused an examination and investigation to be made of appellant's property, copy of which was made available to appellant, who subsequently was represented at a hearing upon appellant's complaint held at Detroit, Michigan on April 7, 1970, at which hearing testimony, arguments and exhibits were presented in support of appellant's contentions.

After consideration of appellant's contentions set forth in the written Appeal No. 0846 and from the data presented at the hearing, along with the examination and investigation of the Commission's staff, the following findings of facts result:

1. Appellant's property consisted of furniture, supplies and inventories.

2. The inventory in question are work garments imported from Puerto Rico. They are packaged in cardboard containers first and then these containers are placed in a larger van for transport. The taxpayer contends the vans are simply cargo carriers and have no relevance to the import immunity of the goods which are still in their "original package", which was packed inside the van.

3. The city of Detroit contends the current market value of this property is $817,920.

4. The Commission staff's finding of value is based upon a personal property appraisal, which resulted in a current true cash value of $817,920. This appraisal was made in accordance with the procedure as given

in the State Tax Commission manual along with the applicatior of the proper multipliers, in the same manner as used in appraising all personal property.

5. Taxable property, both real and personal in the city of Detroit is assessed at a mathematical average of 46.89%, which is sustained by equalization study made by the Commission, which data has been kept routinely current by the Commission.

After these findings of facts and the consideration of all the information contained therein, it is determined, in the opinion of the Commission, that the true cash value is $817,920 and the assessment level is 46.89% of true cash value. Therefore, appellant's assessment should have been $383,500. Since appellant's assessment is $444,680, it is clearly apparent that assessment is significantly above and is not in accordance to the true cash value, reduced to the assessment level of all other real and personal property within the city of Detroit.

WHEREFORE, it is hereby ordered that the assessment of $383,500 be placed upon the assessment roll as the only true and lawful value of such property for the year 1970.

This property is located in the assessment roll in Ward No. 2, Book No. 1, Page 98, Line 15 and Item No. 1445.

Robert L. Purnell, Chairman
R. Gerald Barr, Commissioner
Ward G. Dexel, Commissioner

June 25, 1970

I hereby certify that this is a true copy of the order of the State Tax Commission on file in the State Tax Commission office as provided by Act 147, P.A. 1960.

Edward W. Kane, Secretary

APPENDIX C

STATUTES OF MICHIGAN

Compiled Laws of Michigan 1948, 211.1

"Sec. 1. That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Compiled Laws of Michigan 1948, 211.2

"Sec. 2. • • •

Tax day, preparation of assessment roll, examination of properties by assessors. The taxable status of persons and real and personal property shall be determined as of each December 31, which shall be deemed the tax day for the immediately succeeding calendar year, which is also the tax year, any provisions in the charter of any city or village to the contrary notwithstanding. No assessing officer shall be restricted to any particular period in the preparation of the assessment roll but may survey, examine or review properties at any time prior to or after the tax day."

• • • • •

Compiled Laws of Michigan 1948, 211.8

"Sec. 8. For the purposes of taxation, personal property shall include:

1. All royalties;
2. All goods, chattels and effects within the state;

• • • • •

8. All other personal property not herein enumerated, and not especially exempted by law;"

• • • • •

Compiled Laws of Michigan 1948, 211.13

§7.13. Taxable situs of personal property; date of determination; unknown owner; assessment to beneficial owner; security interests; goods and wares used in trade, commerce or manufacture, average monthly inventory; survey, examination or review of property. Sec. 13. All tangible personal property, except as provided in section 14, shall be assessed to the owner thereof, if known, in the township in which it is located on the tax day. If the owner is not known and there is a person, firm or corporation beneficially entitled to any tangible personal property or having charge or possession thereof, then to such person, firm or corporation: Provided, That one having a security interest without possession may not be assessed as an owner of tangible personal property: Provided, That when tangible personal property is assessed to a person, firm or corporation in charge or possession of such property, such person, firm or corporation shall, unless contrary to a contractual provision, have a right of action for the amount of such taxes against the owner or person beneficially entitled to such property.

Inventories of goods, wares, materials, merchandise and supplies such as are commonly used in trade or commerce or manufacture shall, upon the filing by the owner thereof of a sworn statement with the assessing officer showing the total of such inventories for each of the preceding 12 months ending December 31, be assessed on the basis of the average monthly inventory for such 12-month period. The average monthly inventory shall be computed on the basis of the

number of months during which said inventories of goods, wares, merchandise and supplies had a taxable situs in the assessing district. No assessing officer shall be restricted to any particular period in the preparation of the assessment roll but may survey, examine or review properties at any time prior to or after said tax day.

• • • • •

Compiled Laws of Michigan 1948, 211.14

§7.14 Exceptions to general rule as to taxable situs. Sec. 14.

Business goods and chattels. (1) All goods and chattels situate in some township other than where the owner resides shall be assessed in the township where situate and not elswhere [sic].

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-538

CITY OF DETROIT,
a Michigan Municipal Corporation,
Petitioner-Plaintiff,

vs.

GARMENT CORPORATION OF AMERICA,
a Michigan Corporation,
Respondent-Defendant.

BRIEF OF RESPONDENT GARMENT CORPORATION OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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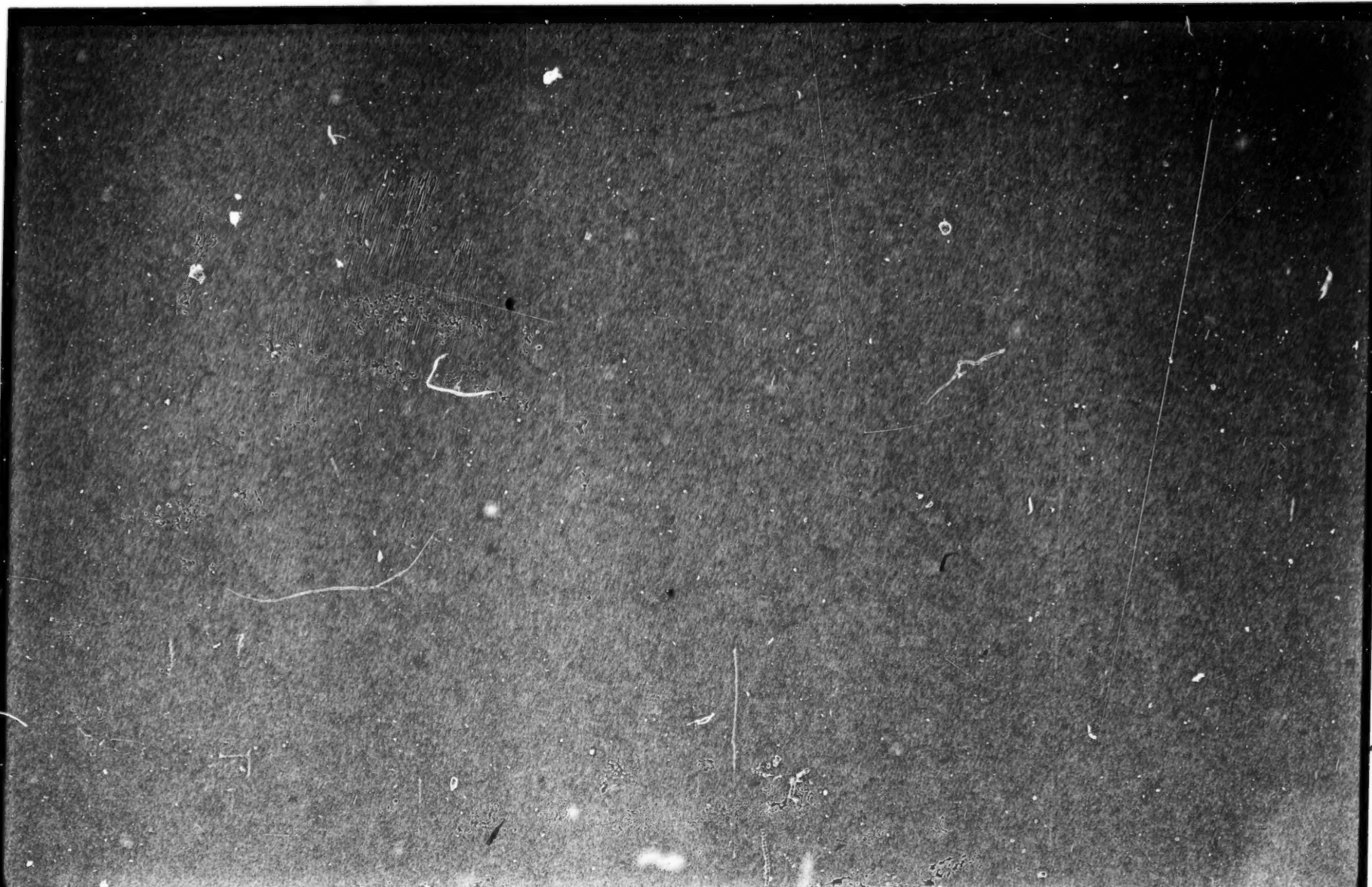

TABLE OF CONTENTS

	Page
Table of Cases and Citations	i
Counter-Statement of Issues	1
Counter-Statement of Case	2
Argument	
I. Imported merchandise held in storage in its original form for resale by the importer is constitutionally protected against taxation	4
A. Moreover, the "original package" doctrine refers to the exporter's package as delivered to the carrier for transportation, not the vehicle in which the package is transported by the carrier	9
II. Inapplicability of appellant's citations	11
III. Conclusion and Relief	16

CASES AND CITATIONS

American Mannex Corp. v. Cronvich, 207 So. 2d 778 1968 (La. Sup Ct.) 11, 12

Askren v. Continental Oil Co., (1920) 252 US 444, 64 L. ed 654, 40 S. Ct. 355 ..... 11, 14, 15

Austin v. Tennessee, 179 US 343, 45 L. ed 224 (1900) 6, 11, 12

Beall Pipe and Tank Corporation v. State Tax Commission, (Oregon, 1969) 458 Pac. 2d 163 (1938) 7, 8

Brown v. Maryland, 12 Wheat (U.S.) 419, 6 L. ed 678 (1827) 5, 6

Page

City of Galveston v. Mexican Petroleum Corp., 15 F 2d 208 ..... 6, 7, 8, 14

City of Detroit v. Kenwall Products Corporation, 14 Mich. App. 657 (1968), appeal denied 381 Mich. 811; certiorari denied 396 U.S. 833., ... 7, 8

City of Detroit v. Klockner, Inc., 383 Mich. 76 (1970) 6, 8

City of Detroit v. Lake Superior Paper Co., 202 Mich. 22 (1918) 7, 8

Department of Revenue v. Beam Distilling Co., 377 US 341, 12 L. ed 2d 362 (1964) 6

Ex Parte Agnew, 89 Neb. 306, 131 N.W. 817 (1911) 7, 10

Florida Greenheart Corp. v. Gautier, (Fla. 1965), 172 So. 2d 589, cert. den., 382 US 825, 15 L. ed 2d 70 ..... 7, 8, 14

Gardner-Richardson Co. v. Evatt, 145 Ohio St., 363, 61 N.E. 2d 704 (1945) 7

Guckenheimer v. Sellers, 81 Fed. 997 (1897) 7, 10

Hooven & Allison Co. v. Evatt, 324 US 652, 89 L. ed 1252 (1944) 6

Knight Newspapers, Inc. v. City of Detroit, 16 Mich. App. 438 (1969) 7

May, F. & Co. v. New Orleans, 178 US 496, 44 L. ed 1165 (1900) 11

McGregor v. Cone, 104 Iowa 465, 73 N.W. 1041 (1898) 7, 10

Mexican Petroleum Corporation v. Louisiana Tax Commission, 173 La. 604, 138 So. 117 (1931) 14

Mexican Petroleum Corp. v. South Portland (1922), 121 Me. 128, 115 Atl. 900, 26 ALR 965 ..... 11, 13

	Page
Philippine Refining Corp. v. Contra Costa County, (24 Cal. App. 2d 665), 76 Pac. 2d 163 (1938)....	7, 13
Simon v. County of Los Angeles, 141 Cal. App. 2d 74, 296 Pac. 2d 381 (1956).....	7, 9
Stanton, E. J. & Sons v. Los Angeles County, 177 Pac. 2d 804 (1947).....	11, 12
Topps of Warren, Inc. v. City of Warren, 27 Mich. App. 59 (1970).....	8
United States v. Sixty-Five Casks Liquid Extracts, 170 Fed. 449 (1909); affd. 175 Fed. 1022.....	7
Washington Chocolate Co. v. King County, 21 Wash. 2d 630, 152 Pac. 2d 981 (1944) cert. den., 324 US 880, 89 L. ed 1431.....	7
Wheeling Steel Corp. v. Porterfield, 14 Ohio St. 2d 85, 236 N.E. 2d 652 (1968).....	7, 8
Youngstown Sheet & Tube Co. v. Bowers, 358 US 534, 3 L. ed 2d 490 (1959).....	6, 7
26 ALR 971.....	9
51 Am. Jur. pp. 136, 138, 262.....	14
Article I, Section 10 of the Constitution.....	2, 4, 17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-538

CITY OF DETROIT,
a Michigan Municipal Corporation,
Petitioner-Plaintiff,

vs.

GARMENT CORPORATION OF AMERICA,
a Michigan Corporation,
Respondent-Defendant.

BRIEF OF RESPONDENT GARMENT CORPORATION OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF ISSUES FOR REVIEW

Where imported merchandise is bulk-packed by the foreign manufacturer in large sealed cartons which are then delivered to a public carrier for transportation to the importer, does the trailer or van of the carrier become the "original package" of the exporter, and does the mere unloading of the cartons from such vans constitute a "breaking" of the original package?

A. Does the mere unloading and warehousing of such cartons by the importer, unopened and intact, change their nature and status as imports protected from local taxation by Article I, Section 10, of the Constitution of the United States?

The lower court said "no" to both questions. Respondent says this was correct.

COUNTER-STATEMENT OF CASE

The controlling facts herein are undisputed and were succinctly set forth in the decision of the Michigan Court of Appeals, Appendix A, pp. 1a-5a (32 Mich. App. 715, 189 N.W. 2d 72 (1971), app. den., July 19, 1971, 385 Mich. 770).

Petitioner's statement is not, however, wholly accurate, and some clarification is, we believe, desirable. Thus, petitioner (page 3) refers to the exporter's cartons as being "at rest" in respondent's place of storage, "awaiting sale to local customers". The fact is, as the lower court noted, that respondent is a national jobber of work garments; and it was undisputed below that these bulk-packed exporter's cartons were stored, unopened and unaltered, in a segregated area of respondent's warehouse pending resale and reshipment generally, to any purchaser wherever located. Accordingly, the undisputed facts herein may be more accurately summarized as follows:

Respondent, a jobber nationally of industrial garments, imports much of these from Puerto Rico. The garments in question are work shirts and pants, which were packaged by the Puerto Rico manufacturer in large cartons, each containing quantities ranging from 5 dozen pants to 10 or 12 dozen shirts and sealed with heavy sealing tape rein-

forced by special bands. These cartons are shipped to respondent, sometimes by air but most often by the Sea-Land or Sea-Train public carrier companies. The latter utilize trailers, generally with detachable or retractable wheels for more efficient stacking on board ship, during the overseas portion of their travel. Upon arrival at port of entry the trailers are landed, the wheels reattached and the trailers or vans are brought to the consignee's warehouse. The vans may be TL (total load) vans wherein respondent's cartons are the entire cargo, or LTL (less than total load) or mixed load vans, wherein respondent's cartons are transported together with the merchandise of others. It was estimated by respondent at the hearing below that of the total cartons imported in 1968 (the 1969 assessment here in question was predicated on personalty on hand as at December 31, 1968, the statutory assessment date), approximately 31% was received in TL (total load) vans, the remainder having been transported in shared load vans containing consignments to others.

The vans or trailers are, of course, at all times the property of the carrier. Upon arrival at respondent's warehouse in Detroit the subject cartons were unloaded and stored, unopened and unaltered in any way, in a segregated portion of the importer's (respondent's) warehouse, pending resale and reshipment.

In the court below it was the position of both petitioner City (see its brief below, p. 2) and the State Tax Commission (its brief below, p. 17) that the cartons of merchandise retained their character as "original packages", and therefore as non-taxable imports when the carrier's van also contains the imports of others, but not when it contained only the cartons consigned to respondent. In the latter instances they argued that the public carrier's van had become the "original package", notwithstanding

that the original cartons were being transported therein; and that the unloading of the cartons at the importer's warehouse was a "breaking" of the "original package" which *ipso facto* destroyed the constitutional immunity of the imported merchandise from local taxation.

Although it was the ruling of the State Tax Commission which was reversed in the court below (wherein the State Tax Commission through the Michigan Attorney General appeared and submitted briefs) the present petition of the City of Detroit indicates that the State Tax Commission has declined to join in the request for issuance of certiorari by this Court.

As to reasons for granting the writ, petitioner asserts the existence (pp. 7, 9) of "pending litigation in this and other states" and "conflicting" judicial views. However, we know of no other case involving the instant issue, nor of any conflict of authorities on either like—or even comparable—facts.

ARGUMENT

I.

IMPORTED MERCHANDISE HELD IN STORAGE IN ITS ORIGINAL FORM FOR RESALE BY THE IMPORTER IS CONSTITUTIONALLY PROTECTED AGAINST LOCAL TAXATION

Imports held in storage for resale by the importer in the original form in which imported, are constitutionally immune from local taxation. Article I, Section 10 of the United States Constitution declares:

> "No State shall, without the consent of Congress, lay Imposts or Duties on imports or exports . . . ".

Since petitioner's entire argument is predicated on its concept of the so-called "original package" doctrine, it should be noted that the constitutional prohibition is addressed to taxes upon "imports", not "packages", and nowhere speaks in terms of "original, unopened package". The "original package" reference first appeared in *Brown v. Maryland,* 12 Wheat (U.S.) 419, 6th L.ed 678 (1827) merely as an example or illustration which could indicate whether the import had in fact been so acted upon, altered, or commingled with the common mass of property within the State, as to lose its distinctive characteristic as an import. The Court reiterated, at page 686:

> " . . . but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

Further, at page 686:

> "The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possesses the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it."

And at p. 688:

> "Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is an essential ingredient, as indispensible to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

To like effect was the comment of Justice Frankfurter in *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 3 L. ed 2 490 (1959), page 502, footnote 1:

> "Although the principles of *Brown v. Maryland* are often termed the 'original package doctrine', Marshall was concerned with a 'package' only because the statute in that case taxed the selling of goods in their original packages. 12 Wheat at 436 and 443. Marshall himself is careful to use the phrase, 'form of package', 12 Wheat at 442, and Mr. Chief Justice Taney, in his reformulation of *Brown v. Maryland,* used the characterization 'form and shape'. See p. 506, *infra.* 'It is a matter of hornbook knowledge that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive, . . . *City of Galveston v. Mexican Petroleum Corp.,* 15 F. 2d 208."

The fact is, of course, that innumerable cases, both state and federal, have affirmed the immunity from taxation of imported merchandise, such as here involved, throughout the period that it is held in storage by the importer in its original form, or in the unopened cartons of the foreign shipper, and has not been committed to actual manufacturing or processing. See among others:

Brown v. Maryland, 12 Wheat. (U.S.) 419, 6 L. ed 678 (1827);

Hooven & Allison Co. v. Evatt, 324 U.S. 652, 89 L. ed 1252 (1944);

Austin v. Tennessee, 179 U.S. 343, 45 L. ed 224 (1900);

Department of Revenue v. Beam Distilling Co., 377 U.S. 341, 12 L. ed 2d 362 (1964);

City of Detroit v. Klockner, Inc., 383 Mich. 76 (1970);

City of Detroit v. Kenwall Products Corporation, 14 Mich. App. 657 (1968), appeal denied 381 Mich. 811; *certiorari denied* 396 U.S. 833;
City of Detroit v. Lake Superior Paper Co., 202 Mich. 22 (1918);
Knight Newspapers, Inc. v. City of Detroit, 16 Mich. App. 438 (1969);
Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 3 L. ed 2d 490 (1959);
Wheeling Steel Corp. v. Porterfield, 14 Ohio St. 2d 85, 236 N.E. 2d 652 (1968);
Florida Greenheart Corp. v. Gautier; (Fla., 1965), 172 So.2d 589, cert. den. 382 U.S. 825, 15 L. ed 2d 70;
Ex Parte Agnew, 89 Neb. 306, 131 N.W. 817 (1911);
McGregor v. Cone, 104 Iowa 465, 73 N.W. 1041 (1898);
Guckenheimer v. Sellers, 81 Fed. 997 (1897);
Simon v. County of Los Angeles, 141 Cal, App. 2d 74, 296 Pac. 2d 381 (1956);
United States v. Sixty-Five Casks Liquid Extracts, 170 Fed. 449 (1909); affd. 175 Fed. 1022;
Washington Chocolate Co. v. King County, 21 Wash. 2d 630, 152 Pac. 2d 981 (1944); *cert. den.* 324 U.S. 880, 89 L. ed 1431;
Gardner-Richardson Co. v. Evatt, 145 Ohio St., 363, 61 N.E. 2d 704 (1945);
Beall Pipe and Tank Corporation v. State Tax Commission, (Oregon, 1969), 458 Pac. 2d 163
Philippine Refining Corp. v. Contra Costa County, (24 Cal. App. 2d 665), 76 Pac. 2d 163 (1938);
City of Galveston v. Mexican Petroleum Corp., (D.C. Tex., 1926), 15 F. 2d 208.

In most cases imports are in fact packaged by the exporter, but this is not always so, nor is this necessary

where the imports remain in their original form, unaltered, unprocessed, uncommingled with local inventory, and have not entered into any local manufacturing process. Thus, *Kenwall, Klockner*, and *Beall, supra*, involved steel coils; *Wheeling Steel, supra*, involved ores shipped in bulk; *Florida Greenheart, supra*, involved lumber; *Lake Superior Paper, supra*, involved rolls of newsprint paper; *City of Galveston, supra*, involved oil.

Here, however, the imported merchandise was in fact completely packaged by the foreign manufacturer in large sealed cases or cartons which were stored, intact, in the importer's warehouse pending resale. Those cases were the "original packages", and we submit that it is less than accurate for petitioner to avert its gaze from that uncontroverted fact, and refer to the public carrier's van as the "original package". The plain difference between mere instruments and technology of transportation and the packages of the exporter was clearly noted by the Court below (App. A, p. 4a):

> "There is no essential difference between these vans and vehicles which are normally used in the over-the-road transportation of property; the only slight difference being that they are modified to permit transportation of the entire van by ship. It can only be concluded that the vans and trailers are, in fact, vehicles, or at least instruments of transportation, and the mere use of a new technology in shipping does not destroy the tax immunity of the property shipped.
>
> • • •
>
> The use of the vans here did not go to the essential nature of the transaction, but to the formalities of transportation. To hold otherwise is to extend the scope of the laws by implication or forced construction, contrary to the established law in this jurisdiction. *Topps of Warren, Inc., v. City of Warren* (1970) 27 Mich. App. 59"

A. The "Original Package" Doctrine Refers to the Exporter's Package as Delivered to the Carrier for Transportation, not the Vehicle in Which the Package is Transported by the Carrier

As above noted, actual packaging is not the legal determinant as to the constitutional immunity of imported merchandise from local taxation. To the extent, however, that the existence of an original "package" becomes here important, the cases clearly point out that the "package" referred to is the package delivered by the shipper to the carrier for transportation. As stated in 26 ALR 971:

> "However, it may be stated that in general an original package *is that package* which, according to custom respecting the particular articles shipped, *is usually delivered by the vendor to the carrier* for transportation, and delivered as a unit to the consignee. This definition, in substance, has been stated in a number of decisions, as is illustrated by the following definitions." (emphasis supplied)

In *United States v. Sixty-Five Casks Liquid Extracts,* 170 F. Rep. 449 (1909) liquids were shipped in casks in carload lots. There, as here, the respondents contended that the car, rather than the casks, was the "original package". *Held,* that "the cask and not the car is the 'original package'."

In *Simon v. County of Los Angeles* (1956), 296 Pac. 2d 381, 141 Cal. App. 2d 74, the Court stated the applicable rule as follows (reading from syllabus):

> "TAXATION—IMPORTS—ORIGINAL PACKAGE DOCTRINE. — The fact that nails are imported from England in kegs and gunny sacks, such sacks or bags being the customary package in Europe, is strong evidence that they are original

> packages within the meaning of the law of foreign commerce, and such presumption applies where the importation is made in the usual manner prevalent among honest dealers in a *bona fide package of customary size and there is no ..idence showing a departure from normal trade operations,* so that those nails whose containers or fasteners have not been opened or removed are still in the status of imports and are not locally taxable." (emphasis added)

Similarly, in *Guckenheimer v. Sellers, supra,* the Court declared, *inter alia:*

> "An original package, within the meaning of the law of interstate commerce, is the package *delivered by the importer to the carrier at the initial point of shipment,* in the exact condition in which it was shipped." (emphasis added)

As stated by the Nebraska Court in *Ex Parte Agnew,* 89 Neb. 306, 131 N.W. 817:

> "An original package as governed by interstate commerce law *is that which is delivered by the importer to the carrier at the initial point of shipment* and retains its form and contents until received by the consignee in the same condition as when shipped." (emphasis added)

The Iowa Court likewise declared, *McGregor v. Cone,* 73 N.W. 1041, 104 Iowa 465 (1898):

> "An 'original package' within the constitutional provision respecting the regulation of commerce, is the identical package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it is shipped." (emphasis added)

Here, that "original package" was the bulk-packed sealed case or carton delivered by the foreign manufacturer to the carrier for overseas transportation.

II.

INAPPLICABILITY OF PETITIONER'S CITATIONS

Petitioner here, as in the Court below. contends that the following cases support its argument:

F. May & Co. v. New Orleans, 178 U.S. 496, 44 L. ed 1165 (1900);
E. J. Stanton & Sons v. Los Angeles County, 177 Pac. 2d 804 (1947);
American Mannex Corp. v. Cronvich, 207 So. 2d 778 (1968) (La. Sup. Ct.);
Austin v. State of Tenn., supra;
Mexican Petroleum Corp v. South Portland (1922) 121 Me 128, 115 Atl. 900, 26 ALR 965;
Askren v. Continental Oil Co., (1920) 252 US 444, 64 L. ed 654, 40 S. Ct. 355.

The lower courts deemed these cases inapplicable and, we submit, correctly so. None of petitioner's citations involved either a comparable factual situation, or any ruling that the vehicle of the public carrier rather than the exporter's cases should be declared the exporter's "original package", the mere unloading of which would destroy the constitutional protection of imports.

Thus, in *F. May & Co. v. New Orleans, supra*, the exporter used large wooden boxes or packing cases for the shipment of miscellaneous merchandise individually bundled or packaged therein. *Held*, that exporter's box, in which the smaller packages were placed by the shipper for transportation by the carrier, constituted the original package, as otherwise the importer could have even the tiniest item, such as Swiss watches, individually boxed, placed on his store shelf for sale at retail, and yet avoid taxation

thereon. Accordingly, *May* upholds, rather than refutes, the decision of the court below.

Stanton, supra, involved the taxability of a cargo of planks, timbers and logs which were not merely unloaded from the carrier but were sorted, classified and stored in bins at the *Stanton* lumber yard to facilitate local sales. Sales were in fact made from such piles or bins, and the remnants commingled with new shipments of the same type. *Held* by the court, that the imported lumber had been so acted upon as to become part of the mass of the property within the State subject to local taxation. The issue there was obviously unlike the issue here; in fact the opinion of the court in *Stanton* reiterates the basic principles applied by the lower court here.

Similarly, in *American Manufacturers, supra,* oil well casings shipped in bulk had come to rest in the dealer's retail establishment, where sales were made from the warehouse racks. *Held,* that the merchandise had come to rest as part of plaintiff's retail inventory, and had become part of the mass of merchandise within the State. *American Manufacturers* did not, as here, involve sealed cartons, held in storage by the importer in a segregated warehouse area pending resale to dealers nationally.

Austin, supra, is equally inapplicable to the case at bar. It presented the wholly different issue arising from the importer's claim that the individual retail cigarette packages (10 cigarettes to the pack), rather than the baskets or containers in which they were transported, should be deemed the original package. *Held,* that the baskets rather than the individual cigarette packs should be deemed the original package, since that represented the unit of shipment as between the manufacturer and the importer. So, here, as between manufacturer and importer, the unit

of shipment was and is the large case or carton containing work garments packed in bulk, and shipped as the units of transportation.

Mexican Petroleum, supra, involved shipment of oil, in bulk, by tanker. Because no other container was involved, the Maine Court concluded that the tanker itself was the "original package", and that such original package was broken when the oil was pumped into smaller storage tanks at the petitioner's premises, in South Portland, for local sale and delivery, the oil being there commingled with prior oil also stored in such tanks [some of the oil thus stored was also used by petitioner's branch office for its private purposes, i.e., heat and power].

Such bulk oil cases are, of course, wholly unlike the case at bar. The tanker is not only the original package or container, it is actually the *only* package or container. It does not, as here, constitute merely a vehicle of transportation for previously packed boxes or containers which are the original packages and *are* the shipper's actual box for such transportation. The Maine Court itself pointed out this distinction, declaring (page 969):

> "In our opinion, therefore, where the oil was stored and shipped in the steamer tank, the oil and tank together may be considered as the original package. *Had there been several moveable containers, as casks or barrels, there would be no contention on this point*". (Emphasis supplied)

It is noteworthy, too, that even in the wholly dissimilar factual situation of the bulk oil or tanker cases, other courts have disagreed with the reasoning of the Maine Court.

> *Philippine Refining Corporation v. Contra Costa County* (24 Cal. App. 2d 665, 76 Pac. 2d 163, 1938);

City of Galveston v. Mexican Petroleum Corporation; 15 F.2d 208 (D.C., Tex., 1926);
Mexican Petroleum Corporation v. Louisiana Tax Commission, 173 La. 604, 138 So. 117 (1931);
Florida Greenheart Corporation v. Gautier, (Florida 1965) 172 So.2d 589, *cert. den.,* 382 U.S. 825, 15 L. ed 2d 70.

Commenting on the decision of the Maine Court, the Louisiana Supreme Court declared (138 So., *supra,* at page 121):

> " . . . we are not in accord with it. It was there held, which we regard as erroneous, that the tank steamer and the oil constituted the original package, and that the withdrawal of the oil from the steamer, caused the oil to lose its character as an import. *The package and the carrier cannot be the same, for then a delivery of the oil would involve a delivery of the carrier.*" (emphasis added)

Askren, too, was a tanker case rather than a cargo of cases or boxes. *Askren* in fact was not even an import case but rather an issue arising under the interstate commerce law, which arises under a different constitutional provision and involves wholly different issues, 51 Am. Jur. pp. 136, 138, 262, *et seq.* As stated at p. 265:

> "With respect to local taxation after the transit has ended, a distinction is made between goods imported from foreign countries and those brought in from other states. Thus, as previously observed, in the case of articles imported from foreign countries, the immunity attaches to the articles themselves, and they are free from local taxation as long as they remain in the form and in the package in which imported, while a state tax upon property brought in from another state, whether it remains in the original packages or not, after it has reached

its destination . . the transit has otherwise ended, and it is in a state of rest, is lawful if the tax is not discriminating in its incidence against the property because of its origin in another state."

Moreover, even in *Askren*, the Court held that as to oil brought in by interstate tankers, a privilege tax was an unlawful burden on interstate commerce, and that the tax was lawful only as to the gasoline held for local sale to customers in individual quantities as desired.

Ironically, in the court below, both the State Tax Commission and the City of Detroit expressly conceded that the instant cartons of merchandise were immune from taxation as "original packages" when transported other than by total load sea-land or sea-train trailers or by other means (Tax Commission brief, p. 17; Detroit brief, p. 2). Surely, however, if such cases or cartons remain the "original packages" when transported by other than total load vans, they do not cease to be such merely because transported by total load vans. Total load, as distinguished from partial (less than) total load vans, or mixed load vans, represent merely a difference in degree.

If petitioner may here treat the unloading of a total load van as a breaking of the exporter's original package, it may, with similar logic, hereafter treat the opening and unloading of any transportation vehicle as a breaking of the original package rendering all imported merchandise subject to local taxation immediately upon arrival, Article I, Section 10 of the Constitution to the contrary notwithstanding.

CONCLUSION

In essence, petitioner's contention is that the public carrier's vans or trailers are merely big boxes, even though on wheels; that as big boxes containing the exporter's packages, the carrier's vehicle rather than the exporter's cartons have somehow become the "original packages" of the foreign manufacturer; that therefore, the mere opening of the trailer and the unloading of the manufacturer's export cartons is a breaking of the "original package" which then and there destroys the constitutional immunity of the imports even though these have not been altered, acted upon, or changed in any way but are merely stored, unopened, and unaltered, in the importer's warehouse pending resale. These contentions, we submit, are obvious *non sequiturs*, clearly erroneous for a variety of reasons:

1. "Original package" is not, in itself, the constitutional test under Article I, Section 10, *supra*. It is merely an evidentiary device to ascertain when imported merchandise has been so acted upon, altered and commingled as to have lost its essential character as an import. Here, it is undisputed, however, that the foreign manufacturer's original, bulk-packed cases had been stored, intact, in the importer's warehouse awaiting resale to its purchasers nationally. The lower court here found (p. 720):

> "In the instant case, the merchandise did not lose its distinctive character as an import".

2. Even as a "container", the carrier's van is not the *original* package or container—an undisputed fact which petitioner's brief continues studiously to ignore. On the contrary, here the *original* package is the large shipping carton or box of the manufacturer, in which dozens of garments are packed, sealed, and delivered to the carrier.

3. A van hauled by truck, motor, or tractor is no different in principle than the freight car hauled by locomotive (or, as is daily observable on the Detroit river, transported between Detroit and Windsor by barge). Whether the vehicle be a truck van, a freight car, a steamship, or a cargo plane, all are in a sense containers with respect to the cargoes they carry. No case holds however,—and petitioner cites none—that large, bulk-packed cartons or cases, suitably sealed by a foreign shipper for overseas transportation, cease to be the *original* packages merely because they are in turn carried or enclosed in the carrier's vehicle as part of the carrier's transportation service.

4. If carried to its logical conclusion, petitioner's theory would enable local taxing entities to nullify and thwart the law of the land expressed by Article I, § 10 of the United States Constitution. Imported merchandise must, of necessity, be transported by whatever means may be appropriate, be they ship, plane, truck, trailer van, or whatever. If the mere vehicle of transportation is now to be declared the exporter's "original package", the mere unloading and storage of which *ipso facto* converts the import into taxable property, then the many decisions of this Court and of many other courts (only partially referred to herein, and in our brief below) which have declined to treat the transportation vehicle as the original package, or declare imports taxable merely by reason of their delivery to the importer would have to be overruled.

The semantic legerdemain involved in labeling the carriers' transportation vehicle as the exporter's "original package" should not obscure or disguise the actual thrust of petitioner's contention. Whatever the euphemism, whether called a breaking of an original package or otherwise, if the mere opening of the carrier's vehicle for unloading and delivery of the imported merchandise de-

stroys the constitutional immunity, then, for all practical purposes, Article I, Section 10, has been emasculated and made a dead letter.

Petitioner's theory is unsupported by any of the cases that it cites. It is contrary to the actual provision of Article I, § 10 of the Constitution of the United States, and it is contrary to all of the decisions of all of the courts which have, throughout the years, addressed themselves to this issue.

The ruling of the Michigan courts herein was clearly correct. We submit that the petition for writ of certiorari is without basis or justification in fact or in law, and should be denied.

Respectfully submitted,

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